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Attorneys for United States of America

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS GROSSI, SR.,

Defendant.

No. 04-CR-40127 DLJ

CORRECTED STIPULATION
AND ORDER RE: SCHEDULING

UNITED STATES OF AMERICA,

Plaintiff,

v.

\$608,916.58 IN U.S. CURRENCY, AS
SUBSTITUTE *RES.* FOR REAL PROPERTY
LOCATED AT 2638 MARKET STREET,
OAKLAND, CALIFORNIA,

Defendant.

No. 04-CV-03055 DLJ

CORRECTED STIPULATION
AND ORDER RE: SCHEDULING

1 For reasons which follow, the parties propose the stipulation which follows to keep the hours
2 to be expended in the litigation on the pending attorney fees motion at a minimum.

3 On September 5, 2012, counsel for defendant Thomas Grossi, Sr., and claimant/petitioner
4 Lauretta Weimer, filed a motion for attorney fees based on 28 U.S.C. § 2465(b)(1)(A). On
5 September 5, 2012, the parties exchanged emails regarding the government's position, *inter alia*, that
6 there is no waiver of sovereign immunity under 28 U.S.C. § 2465(b)(1)(A) for fees in this case
7 because the express language of Section 2465(b)(1)(A) provides in pertinent part that the
8 government can only be held liable for a "reasonable attorney fees" in "any civil proceeding to forfeit
9 property" in which a "claimant substantially prevails." 28 U.S.C. § 2465(b)(1)(A). Key cases on
10 which the government told counsel it relies include : *United States v. Moser*, 586 F.3d 1089 (8th Cir.
11 2010) (*en banc*); *United States v. Certain Real Property . . . 317 Nick Fitchard Road*, 579 F.3d 1315
12 (11 Cir. 2009); *see also United States v. Kahn*, 497 F.3d 204, 208-09 and n. 6 (2d Cir. 2007).

13 The United States has also proposed that the parties first litigate the jurisdictional issue. If
14 the Court agrees it lacks jurisdiction, the attorney fees matter ends and the case is closed, except for
15 any appeal. If the Court rules that it has jurisdiction, then the United States asserts that it needs
16 discovery in order to address the specifics. Claimants do not agree that the government is entitled
17 to discovery, but the parties agree that fee awards have to be based on the "lodestar" which is the
18 reasonable hourly rate times the number of hours reasonably expended to substantially prevail. The
19 government questions whether claimant has properly supported the hourly rates claimed and whether
20 the number of the hours is reasonable. To oppose the fee motion, the government believes it needs
21 discovery to address: whether counsel only seeks hours spent on the civil case and has excluded time
22 spent on the criminal case; whether the time claimed was on issues on which claimant prevailed;
23 whether claimant's counsel exercised "billing judgment"; whether the hours claimed are properly
24 compensable as hours of an attorney in this type of litigation (*e.g.*, driving 1.5 hours to pick up
25 documents); whether claimant's counsel has provided otherwise adequate time/date/task information
26 on which to base an award; whether the rates claimed are "reasonable hourly rates."

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28 Corrected Stip & Order Re: Sched.
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1 The United States is sensitive that motions for fees should not take on a life of their own, but
2 at the same time it has legitimate jurisdictional concerns and legitimate concerns about whether the
3 record claimant's counsel has created supports the fee award claimed. In addition, the undersigned
4 is recovering from pneumonia and needs additional time to file its motion to dismiss the fee motion
5 for lack of jurisdiction. Unless time is extended, the United States must file on or before September
6 19, 2012.

7 Considering the foregoing, the United States contacted counsel for claimant and sought his
8 agreement to the schedule which is below. Albeit counsel for claimant does not agree that the Court
9 lacks jurisdiction or that its fee motion is deficient, counsel for claimant, David M. Michael, agrees,
10 subject to the Court's approval, to the following schedule:

11 1. On or before October 3, 2012, the United States shall file its motion to dismiss the
12 attorneys' fee motion for lack of jurisdiction;

13 2. On or before October 17, 2012, counsel for claimant will file its opposition to the
14 motion;

15 3. On or before October 24, 2012, the United States will file its reply;

16 4. On November : , 2012 at 9:00 a.m. in San Jose Courtroom 7, 4th Floor at 280 South
17 First Street, San Jose, CA, the Court will hold a hearing on the fee motion;

18 5. On or before October 3, 2012, the United States shall also file a motion to take limited
19 discovery from counsel for claimant who seek fees and a copies of the specific discovery that the
20 United States requests;

21 6. If the Court rules against the United States on the jurisdictional issue, the parties shall
22 hold an in person meet-and-confer within 20 days to see whether they can informally resolve the fee

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28 Corrected Stip & Order Re: Sched.
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1 motion. If the fee motion cannot be resolved, then counsel for the United States will notice the
2 motion for discovery on the 5-week schedule. Civ. L. R. 7-2; Fed. R. Crim. P. 32.2(c)(1).

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4 IT IS SO STIPULATED:

MELINDA HAAG
United States Attorney

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6 Dated: September 17, 2012

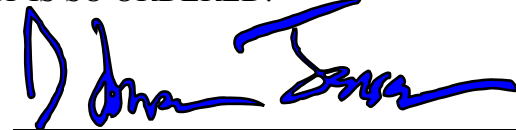
/s/
PATRICIA J. KENNEY
Assistant United States Attorney
Attorneys for the United States of America

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8
9 Dated: September 17, 2012

/s/¹
DAVID MICHAEL
EDWARD M. BURCH
LAW OFFICES OF DAVID M. MICHAEL
Counsel for Defendant Thomas Grossi, Sr.,
and Claimant/Petitioner Laretta Weimer

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13 BASED ON THE FOREGOING STIPULATION, IT IS SO ORDERED:

14 ~~ORDER~~ ~~BY~~ ~~THE~~ ~~COURT~~



HONORABLE D. LOWELL JENSEN
United States District Judge

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25 ¹ Mr. Michael, who is out-of-the country, worked on this stipulation with AUSA Kenney
26 and authorized her by email to use “/s/” in lieu of his original signature. AUSA Kenney received the
27 authorization, but inadvertently failed to affix the “/s/” for each attorney when the original stipulation
28 and proposed order was filed in the late evening on September 17, 2012. Hence, this “corrected”
stipulation and order re: scheduling is being filed today, September 18, 2012.